Application without permission under ECRO not validated retrospectively (Webster v Ashcroft)

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Restructuring & Insolvency analysis: Oliver Wooding, barrister and mediator at St John's Chambers, examines the High Court's decision in Webster v Ashcroft that a district judge at first instance had not erred in law or wrongly exercised his discretion in ordering the appellant to pay the costs which the respondent had incurred in presenting a bankruptcy petition against the appellant, or in refusing to order the respondent to pay the appellant's costs. The High Court held that an application by the appellant, who was subject to an extended civil restraint order (ECRO), to set aside the respondent's statutory demand without first having received permission under the ECRO for that application was not retrospectively validated by a subsequent order giving permission under the ECRO. Therefore, when the bankruptcy petition had been presented before that permission was granted there was not an outstanding application to set aside the statutory demand which, under section 267(2)(d) of the Insolvency Act 1986 (IA 1986), would have prevented the bankruptcy petition from having been validly presented.

Webster v Ashcroft [2019] EWHC 2174 (Ch), [2019] All ER (D) 49 (Aug)

What are the practical implications of the judgment?

The judgment deals with three discrete points—two dealing with the practical effect of ECROs, and one on the consequences of presenting a bankruptcy petition based on an unpaid statutory demand where, unknown to the petitioning creditor, an application to set aside the demand has been made.

So far as the ECRO aspect is concerned, the judgment first reinforces the effect of CPR PD 3C. If a litigant who is subject to an ECRO issues any claim which is caught by the ECRO, then it is automatically struck out with no further action required unless the litigant has obtained permission first. Further, if permission is granted under the terms of the ECRO, it does not validate any steps previously taken by the litigant—particularly so far as time limits may be concerned. Rather, litigants now have the ability to issue the claim or application they wished to do so. Clients who are protected by the existence of a ECRO (because they are the opposing party in proceedings involving a vexatious litigant) can remain assured that they do not need to take any active steps unless or until permission is granted.

Second, the judgment makes clear that a freestanding application to set aside a statutory demand, related to the litigation underpinning the ECRO, will indeed be caught by the ECRO, even though it is in substance a 'defensive' move, ie in response to the service of a statutory demand.

Third, the judgment followed an earlier High Court decision (and did not follow another) on the effect of an improperly presented bankruptcy petition. IA 1986, s 267(2)(d) prevents the presentation of a bankruptcy petition based on a statutory demand where an application to set aside the statutory demand is outstanding. But where the petitioning creditor did not know of the application to set aside the statutory demand at the time of presenting the petition, then the correct approach is to adjourn the bankruptcy petition under the court's powers in IA 1986, s 266(3), until the outcome.

What was the background?

This is the latest round of long-running private client/contentious probate litigation involving an extended family and, in particular, the family home.

The appellant had issued claims on behalf of himself and his mother challenging the validity of his grandmother's last will and, in the alternative, seeking to establish an interest by way of proprietary estoppel over the family home and associated land in his favour. The claims were dismissed after a full trial in the High Court in 2013. Costs orders were

made in favour of the respondent (a member of the family) and a solicitor, who were the executors and trustees of the relevant estate and trusts.

The appellant continued to make claims and applications that were collateral attacks on the original judgment. In 2015, he was made subject to two ECROs relating to and touching on the original litigation. In 2017, one of the ECROs was renewed for a further two years.

In February 2017, the respondent served a statutory demand based on unpaid costs from the original claim. The appellant issued an application to set aside the statutory demand in March 2017. The respondent presented a bankruptcy petition in August 2017. In September 2017, HHJ Paul Matthews, who would later hear the appeal and was the judge nominated under the ECRO, gave permission to the appellant to issue his application to set aside. In due course in 2018, the application to set aside was dismissed on its merits. Shortly before the adjourned bankruptcy petition was heard, the appellant paid off the petition debt. The petition was dismissed, and the hearing was about costs. The district judge awarded costs in favour of the respondent and dismissed the appellant's application for his costs.

In 2019, HHJ Paul Matthews granted permission to appeal against the costs order. The issue was whether the effect of granting the appellant permission to apply to set aside the statutory demand was retrospective, so that at the time of the presentation of the petition there was a valid outstanding application to set aside the statutory demand.

What did the court decide?

HHJ Paul Matthews dismissed the appeal and thereby confirmed the original order for costs made by the district judge, who had not made any error of law or failed to take into account any material matters.

The first question was whether, in principle, an ECRO bites on an application to set aside a statutory demand. The ECRO regime is intended to act as a filter to prevent the court, and opposing parties, having to deal with vexatious claims over which they otherwise have no control. The issue of a claim is a positive step unilaterally taken by a claimant. But the ECRO regime does not affect the ability of litigants subject to a ECRO to take steps to defend themselves if a claim is issued against them.

Applications to set aside a statutory demand do not fit easily into the ECRO regime. On the one hand, they are a form of court proceedings which must be commenced by the debtor—on the other hand, they are in substance a defence to a statutory demand (served outside of the court process).

HHJ Paul Matthews concluded that on the wording of this ECRO (which is based on the standard order), an application to set aside a statutory demand which was based on costs orders made within the original claim between the same parties in the same capacity, was indeed caught by the ECRO. The better way of dealing with the point that it was a defensive step would be to consider that it would normally (ie unless bound to fail) be appropriate to give permission under the ECRO regime, which would be a point in favour of litigants subject to a ECRO which is absent if they were attempting to start a new claim.

In reaching his conclusion, HHJ Paul Matthews also noted that there was an assumption by Lewis J in *Society of Lloyd's v Noel* [2015] EWHC 734 (QB), [2015] All ER (D) 222 (Mar) that an application to set aside would also be caught by an ECRO.

The second question was whether the effect of giving permission to bring an application under the ECRO was retrospective or not. That would, in turn, have consequences for whether IA 1986, s 267(2)(d) was satisfied when the petition was presented. This was an area with no previous reported case law.

It is common in litigation to come across orders which either validate or deem effective steps taken previously that would otherwise not be effective. A familiar example may be an order deeming previous steps taken as good service (CPR 6.15(1))—an example of retrospective validation. Another may be the abridging of time for service or notice or compliance under CPR 3.1(2)(a)—which has the same practical effect by altering the relevant time limit, rather than keeping the time limit but permitting what would otherwise not be allowed.

HHJ Paul Matthews' conclusion was that his order in September 2017 did not retrospectively validate the application made by the appellant in March 2017. He concluded that the wording of CPR PD 3C was clear and prospective in

effect. In short, CPR PD 3C, para 3.3(1)(a) stated that an application issued in breach of an ECRO would be automatically dismissed with no further action, and CPR PD 3C, paras 3.2, 3.3 and 3.4 made clear that permission was needed before making any such application.

Further, HHJ Paul Matthews noted a parallel to the decision of Mr Anthony Mann QC (as he then was) in *Times Newspapers Ltd v Chohan* [2000] Lexis Citation 376, [2000] All ER (D) 1442, where the judge there held that a successful application (out of time) to extend the time for making an application to set aside a statutory demand did not have retrospective effect for the purposes of IA 1986, s 267(2)(d) either.

As such, parties who have the benefit of an ECRO should not be concerned as to any steps they have taken previously before permission has been granted. Similarly, a party subject to an ECRO would have a strong argument (as was impliedly the case here) for permission to bring an application to set aside a statutory demand out of time if the reason for being out of time was the delay in obtaining permission under the ECRO.

The third question was what, assuming that there was retrospective effect, the consequence for the petition would be. HHJ Paul Matthews agreed with the decision of Norris J in *Regis Direct Ltd v Hakeem* [2012] EWHC 4328 (Ch) where the judge there held that if the petition was presented by the creditor without knowledge of the application to set aside, then Parliament would not have intended the petition to be struck out or a nullity. Rather, the court should use its powers to stay the petition until the application to set aside had been ruled upon. In *Regis*, the petitioning creditor did not know about the existence of a valid application to set aside at the time of presentation because the application had not been processed properly by the court, let alone served. In this case, at the time of presentation, the respondent was entitled to rely on the automatic striking out of an application brought without permission and there could be no question of knowledge that it was valid until after the presentation date.

There has been a recent trend for more published decisions relating to ECROs which until now have not received a great deal of attention. *Webster v Ashcroft* provides a helpful addition to identifying the scope and nature of these orders.

Oliver Wooding appeared for the respondent in this case.

Interviewed by Robert Matthews.

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